Supreme Court, U.S.
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No. 06-384

In The
Supreme Court of the United States

JAVIER OTONIEL BUSTAMANTE-BARRERA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

A. Respondent's restatement of the question presented confuses the issue.

Respondent restates the question presented. Resp. Br. at i. Bustamante's question presented asks whether state or federal law determines if a legally-separated parent has legal custody of a child under 8 U.S.C. 1432(a). Pet. at i. Respondent's question presented asks whether the *nunc pro tunc* amended divorce decree gave Bustamante's mother sole legal custody. Resp. Br. at i. Respondent's restatement of the question presented confuses the issue.

This Court will not have to decide whether the amended divorce decree gave Bustamante's mother sole legal custody. Instead, this Court will only have to decide whether state or federal law determines if Bustamante's mother had sole legal custody. The Fifth Circuit held that whether Bustamante's mother had sole legal custody was determined by federal – not state – law. App. 20a-21a. The Fifth Circuit, therefore, never examined whether the amended divorce decree gave Bustamante's mother sole legal custody under California law. *Id.* at 22a-23a. Instead, it analyzed the amended divorce decree under federal law and held that Bustamante's mother did not have sole legal custody. *Id.* at 22a-25a. If this Court decides that the relevant state's domestic-relations law determines legal custody under § 1432(a), then it can remand this case for the Fifth Circuit to consider the amended divorce decree's effect under California law. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 29 (1981) ("Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here."); Pet. at 23.

On remand, the Fifth Circuit can consider the Full Faith and Credit Act's effect.[1] Bustamante argued to the Fifth Circuit that, under the Full Faith and Credit Act, the amended divorce decree had the same effect in that court as in a California court. App. 22a. The Fifth Circuit held that the Full Faith and Credit Act did not apply because federal law determined Bustamante's legal custody.[2] Bustamante has found no case considering the Full Faith and Credit Act's effect in § 1432(a) determinations. Respondent notes that in *Fierro* v. *Reno*, 217 F.3d 1 (CA1 2000), even though the First Circuit held that state law determines § 1432(a) legal custody, it still refused to follow a *nunc pro tunc* amended divorce decree issued after the immigrant was an adult. Resp. Br. at 11-12. The First Circuit, however, never considered the Full Faith and Credit Act's effect. *Fierro*, 217 F.3d at 4-6. In fact, the First Circuit did not even mention the Full Faith and Credit Act in *Fierro*.

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[1] 28 U.S.C. 1738 ("The records and judicial proceedings of any such State * * * shall be proved or admitted in other courts within the United States * * * . Such Acts, records and judicial proceedings * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken.").

[2] App. 22a ("Our refusal to credit the amended decree for purposes of federal immigration law does not even implicate the Full Faith and Credit Act. For purposes of § 1432(a), Petitioner's custody status prior to his eighteenth birthday is determined by federal law; it is *not* dependent on the law of any particular state. * * * Here, we do not question the amended decree's *validity* – a question that, in other circumstances, the Full Faith and Credit Act might prohibit our asking. But, the Full Faith and Credit Act certainly does not require us to accord that state decree conclusive effect in U.S. *naturalization* proceedings.") (emphasis in original).

Because neither the Fifth Circuit, nor any other circuit, has considered the Full Faith and Credit Act's effect if state-law governs § 1432(a) legal-custody determinations, the best course is to remand this case to the Fifth Circuit for initial consideration of that issue. *Pennhurst State Sch.*, 451 U.S. at 29. If this Court determines that state domestic-relations law governs § 1432(a) legal custody (the issue in Bustamante's question presented) and then remands the case for consideration of the Full Faith and Credit Act's effect, it will not address whether the amended divorce decree gave Bustamante's mother legal custody (the issue in Respondent's question presented). Because this Court will consider Bustamante's question presented, but will not have to consider Respondent's question presented, Bustamante's question presented is the better way of analyzing this case.

B. There is a circuit split on the question presented.

Respondent restates the question presented so as to eliminate any circuit split. Resp. Br. at 8-13. But, there is a circuit split on the question that this Court will actually consider in this case – whether state or federal law determines § 1432(a) legal custody.

Three Circuits – the First, Seventh, and Ninth – hold that state law determines whether a legally-separated parent has legal custody under § 1432(a),[3] while two Circuits – the Second and the Fifth – hold that federal law

[3] *Fierro*, 217 F.3d 1; *Wedderburn* v. *INS*, 215 F.3d 795 (CA7 2000), cert. denied, 532 U.S. 904 (2001); *Minasyan* v. *Gonzales*, 401 F.3d 1069 (CA9 2005); Pet. at 8-10.

determines the issue.[4] One Circuit – the Third – uses state law to determine whether parents are legally separated under § 1432(a), but uses a combination of state and federal law to determine § 1432(a) legal custody.[5] This is a clear split involving the six circuits that hear 88% of immigration appeals. Pet. at 12.

Respondent contends that cases involving legal separation under § 1432(a) should not be considered in determining whether there is a circuit split. Resp. Br. at 13-14. Instead, Respondent argues, § 1432(a) legal-separation cases must be kept distinct from § 1432(a) legal-custody cases. *Ibid.* Respondent is wrong for two reasons. First, because "legal separation" and "legal custody" are both found in the same sentence and the same subsection of § 1432(a), it makes sense to interpret the terms similarly. Second, the circuit courts have relied on legal-custody cases when interpreting the term "legal separation" and relied on legal-separation cases when interpreting the term "legal custody." In *Minasyan*, the Ninth Circuit relied on *Fierro* – a legal-custody case – in holding that state law determines whether parents are legally separated.[6] And, in this case, the Fifth Circuit

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[4] App. 1a; *Nehme* v. *INS*, 252 F.3d 415 (CA5 2001); *Brissett* v. *Ashcroft*, 363 F.3d 130 (CA2 2004); Pet. at 6-8.

[5] *Morgan* v. *Attorney General*, 432 F.3d 226 (CA3 2005); *Bagot* v. *Ashcroft*, 398 F.3d 252 (CA3 2005); Pet. at 10-11.

[6] *Minasyan*, 401 F.3d at 1077 ("Thus, we must look to California – the state with jurisdiction over Minasyan's parents' marriage – when deciding whether a legal separation occurred. *See* * * * *Fierro v. Reno*, 214 F.3d 1, 4 (1st Cir. 2000) ('[S]ubject to possible limitation, we think that the requirement of 'legal custody' in section 1432 should be taken presumptively to mean legal custody under the law of the state in question.')."); *but see Bagot*, 398 F.3d at 267 (not following *Morgan*, 432 F.3d 226 – the Third Circuit's legal-separation precedent – when

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relied on *Nehme* – a legal-separation case – in holding that federal law determines whether a parent has legal custody. App. 20a (citing *Nehme* for the proposition that "[i]nterpretation of § 1432(a)(3) is a matter of *federal law*") (emphasis in original).[7]

Even if this Court only considers legal-custody cases – as Respondent suggests – there is still a four-Circuit split. The Fifth Circuit uses federal law to determine whether a parent has legal custody,[8] while the First and Seventh Circuits use state law.[9] The Third Circuit applies its own

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deciding whether state or federal law determines legal custody under § 1432(a)).

[7] Respondent contends that "the court of appeals here expressly noted that the decisions addressing 'legal separation' informed its analysis, but did not 'control[] it.'" Resp. Br. at 13 (quoting App. 13a n.30) (alteration in Resp. Br.). In that quote, however, the Fifth Circuit was not referring to whether state or federal law determined legal custody under § 1432(a). Instead, the Fifth Circuit was discussing whether § 1432(a) required *sole* legal custody, or if *joint* legal custody was sufficient. App. 13a n.30. The Fifth Circuit, therefore, did not hold that legal-separation cases do not control whether state or federal law determines legal custody under § 1432(a).

[8] App. 22a ("For purposes of § 1432(a), Petitioner's custody status prior to his eighteenth birthday is determined by federal law; it is *not* dependent on the law of any particular state.") (emphasis in original); Pet. at 7.

[9] *Fierro*, 217 F.3d at 4 (legal custody presumptively means "legal custody under the law of the state in question"); *Wedderburn*, 215 F.3d at 799; Pet. at 8-9. Respondent contends that *Wedderburn* dealt only with legal separation, and not with legal custody. Respondent is incorrect. In *Wedderburn*, the Seventh Circuit held that "'*[l]egal custody*' and 'legal separation of the parents', as words in a federal statute, must take their meaning from federal law. * * * But federal law may point to state (or foreign) law as a rule of decision, and this is how the INS has consistently understood these terms." *Wedderburn*, 217 F.3d at 799 (emphasis added). The Seventh Circuit then examined whether, Jamaica – the relevant jurisdiction – "permits unmarried persons to obtain a 'legal separation' and an award of '*legal custody*' of

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test in determining whether a parent has legal custody: If there is a state or foreign legal decree granting custody, then it is followed; but, if there is no decree, then – as a matter of federal law – the parent with actual uncontested custody has legal custody. *Bagot*, 398 F.3d at 269-70 (Rosenn, J. and Nygaard, J., concurring).[10] Thus, four Circuits apply three different standards to determine whether parents have legal custody under § 1432(a). So, even following Respondent's view that only legal-custody cases should be considered, there is still a circuit split on the question presented.

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the children." *Ibid.* (emphasis added). *Wedderburn*, therefore, held that both legal separation and legal custody were governed by the relevant state or foreign country's law.

[10] The Third Circuit has internal dissension on its § 1432(a) legal-custody approach. Judge Becker disagreed with the *Bagot*-panel majority and said that state law controls if it "clearly determines" legal custody. *Bagot*, 298 F.3d at 263 (Op. of Becker, J.) ("I believe that our first obligation under *Fierro* is to examine New York law to see whether it clearly determines legal custody."). If state law clearly establishes legal custody – regardless whether there is a specific legal decree granting custody – then Judge Becker believed that state law must be followed. *Id.* at 263 n.9 (Op. of Becker, J.) ("another state's law might more clearly fix custody even in the absence of a decree, and under *Fierro* I would look to that law in preference to the 'actual uncontested custody' fallback"). Only if state law is silent on who has custody would Judge Becker have applied a federal rule granting legal custody to the parent who last had actual uncontested custody. *Id.* at 263 (Op. of Becker, J.) ("It is not necessary to decide that New York law *requires* a valid judicial decree to create legal custody. Rather, I conclude only that New York law is not sufficiently clear to fix INA legal custody in the absence of such a decree. Therefore, under *Fierro*, I look to New York law to see if any court has issued a valid order determining legal custody. In the absence of such an order, and there is none here, I will not attempt to divine what New York courts would do; rather, I will fall back on the 'actual uncontested custody' prong of *Matter of M–*[, 3 I.&N. Dec. 850, 1950 WL 6650 (BIA 1950)].") (emphasis in original).

C. The question presented is important even though § 1432(a) has been repealed prospectively.

Respondent contends that this Court should not grant certiorari because 8 U.S.C. 1432(a) has been repealed prospectively. Resp. Br. at 14. Respondent contends that the repeal means that "the pool of aliens who can potentially seek derivative citizenship under Section 1432(a) will be steadily diminishing." *Ibid.* While Respondent is correct that the number of people governed by § 1432(a) is diminishing, that number is still large, and § 1432(a) will continue to apply for decades. Even though § 1432(a) was repealed by the Child Citizenship Act of 2000,[11] it still applies – and will continue to apply – to people who turned eighteen before 2001. *Id.* at 2 n.2; Pet. at 2 n.1, 13. So, § 1432(a) applies to aliens who are now twenty-four or older.

As Bustamante explained in his petition, derivative citizenship often becomes an issue only when a person is convicted of a felony. Pet. at 14-16. Because people can commit felonies at any age, federal courts will have to determine whether people are derivative citizens under § 1432(a) for many years to come. Pet. at 14-16. If this Court does not address this circuit split, then the courts of appeals will continue to apply inconsistent law for decades when determining citizenship.

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[11] Pub.L. No. 106-395, 114 Stat. 1631.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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